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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. XAVIER KOMA BOATWRIGHT, Defendant and Appellant.	H044347 (Santa Clara County Super. Ct. No. C1640087)

Defendant Xavier Koma Boatwright pleaded no contest to one count of human trafficking (Pen. Code, § 236.1, subd. (c)). The trial court suspended imposition of sentence and placed defendant on probation for three years with various terms and conditions. On appeal, defendant contends the probation conditions involving his use of the Internet and the search of his electronic devices are unconstitutionally vague and/or overbroad. The order is affirmed.

I. Statement of Facts[1]

In mid-June 2016, defendant brought 17-year-old Jane Doe to a hotel after detectives from the Santa Clara County Human Trafficking Task Force arranged a date.

[1] The statement of facts is based on the probation department's waived referral memorandum and the prosecutor's opposition to defendant's objection to probation conditions.

Defendant had been pimping Ms. Doe for over a month and his average daily earnings were over $1,000. Defendant used social networking sites to advertise Ms. Doe's services. He also sent text messages to his sister in which he instructed her on how to post advertisements on backpage.com, a Web site known for promoting prostitution. An image on defendant's phone displayed a document, which was titled "'Rules 2 Da Game of Hoez.'" The first rule was "'Always make them need and depend on you so you have power over them (Power is Control).'" While defendant was in jail, he was recorded on telephone calls to his sister directing her to contact Ms. Doe. Defendant was also recorded talking to an unknown man about his intentions to continue pimping Ms. Doe and to expand his "pimping 'empire.'"

II. Discussion

A. Background

At the sentencing hearing, defense counsel stated: "I secondly wanted to object to the broad term of Internet use. I think that -- especially in concerns to 11 and 12 that the restriction on Internet use is overbroad, a violation of due process, in this day and age not to be able to use the Internet, you know, will hinder his ability to get a job, to read the news, everything that we use the Internet for day-in and day-out."

The prosecutor responded, "With respect to the lines 11 and 12, I think that 12 is just to not delete the Internet browser history, so I don't think that there would be any infringement on anyone's due process rights with respect to that. [¶] And I think similarly 11 is narrowly tailored enough that the probation department indicated it's simply so that they can get pre-approval, and I think that the nexus here is established based off of how this crime was committed, it was certainly done over a period of time, it was done using the Internet, and so I think that it's appropriate to have close supervision and monitoring particularly in light of the statement that we heard on jail calls as to ongoing conduct."

The trial court placed defendant on probation and imposed several probation conditions, which the probation department's memorandum identified as probation conditions Nos. 6 through 12.

B. Analysis

Defendant challenges the probation conditions involving Internet use and electronic searches as unconstitutionally vague and/or overbroad.

"'[T]he underpinning of a vagueness challenge is the due process concept of "fair warning." [Citation.] The rule of fair warning consists of "the due process concepts of preventing arbitrary law enforcement and providing adequate notice to potential offenders" [citation], protections that are "embodied in the due process clauses of the federal and California Constitutions."' [Citation.] 'In deciding the adequacy of any notice afforded those bound by a legal restriction, we are guided by the principles that "abstract legal commands must be applied in a specific *context*," and that, although not admitting of "mathematical certainty," the language used must have "'*reasonable* specificity.'"' [Citation.] 'A probation condition "must be sufficiently precise for the probationer to know what is required of him, and for the court to determine whether the condition has been violated," if it is to withstand a challenge on the ground of vagueness. [Citation.]' [Citation.]" (*People v. Smith* (2017) 8 Cal.App.5th 977, 986.)

The overbreadth doctrine focuses on other, though related, concerns. "'[A]dult probationers, in preference to incarceration, validly may consent to limitations upon their constitutional rights . . . .' [Citation.] 'A probation condition that imposes limitations on a person's constitutional rights must closely tailor those limitations to the purpose of the condition to avoid being invalidated as unconstitutionally overbroad.' [Citation.] Under this doctrine, '"'a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.'" [Citations.]' [Citation.]

‘“A law’s overbreadth represents the failure of draftsmen to focus narrowly on tangible harms sought to be avoided, with the result that in some applications the law burdens activity which does not raise a sufficiently high probability of harm to governmental interests to justify the interference.” [Citation.]’” (*People v. Ebertowski* (2014) 228 Cal.App.4th 1170, 1175 (*Ebertowski*).)

“‘The essential question in an overbreadth challenge is the closeness of the fit between the legitimate purpose of the restriction and the burden it imposes on the defendant’s constitutional rights—bearing in mind, of course, that perfection in such matters is impossible, and that practical necessity will justify some infringement.’ [Citation.]” (*People v. Pirali* (2013) 217 Cal.App.4th 1341, 1346 (*Pirali*).)

We review the constitutionality of a probation condition de novo. (*In re Sheena K.* (2007) 40 Cal.4th 875, 889 (*Sheena K.*).)

1. Internet Access Probation Condition (No. 11)

The trial court imposed probation condition No. 11 as follows: “The defendant shall not knowingly access the Internet or any other on-line services through the use of a computer or electronic device at any location, including places of employment without prior approval of the probation officer.” The trial court also added: “In terms of Internet use, if the defendant -- if he fails that, and the probation officer feels he’s not being cooperative in that, he can always ask for a request by his counsel to set it on calendar and the court will address that issue.”

Defendant contends that this probation condition is unconstitutionally overbroad.

In *Pirali*, *supra*, 217 Cal.App.4th 1341, this court rejected an overbreadth challenge to a probation condition restricting Internet access. The probation condition at issue provided: “‘You are not to *have access* to the Internet or any other on-line service through use of your computer or other electronic device at any location without prior approval of the probation officer.’” (*Id.* at p. 1345.) This court concluded that the probation condition at issue was not a “blanket prohibition” on Internet access because it

"grants defendant the ability to access the Internet on his computer and other electronic devices so long as he obtains prior permission from his [probation] officer." (*Id.* at pp. 1349-1350; see also *United States v. Rearden* (9th Cir. 2003) 349 F.3d 608, 621 ["The condition does not plainly involve a greater deprivation of liberty than is reasonably necessary for the purpose because it is not absolute; rather, it allows for approval of appropriate online access by the Probation Officer"].)

In the present case, as in *Pirali*, the probation condition No. 11 permits defendant to access the Internet after having obtained permission from the probation officer. Moreover, the trial court added that defendant could return to court for reconsideration of the issue of his access to the Internet. Thus, the Internet access condition imposed here was not a "blanket prohibition" on Internet access (*Pirali, supra*, 217 Cal.App.4th at p. 1349) and it is not unconstitutionally overbroad.

Defendant also contends that requiring prior approval by the probation officer serves as a prior restraint on his First Amendment rights.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." (*Nebraska Press Assn. v. Stuart* (1976) 427 U.S. 539, 559.) "Any prior restraint on expression comes . . . with a 'heavy presumption' against its constitutional validity. [Citations.]" (*Organization for a Better Austin v. Keefe* (1971) 402 U.S. 415, 419.)

Here, there is no prior restraint on defendant's First Amendment rights. Defendant may exercise his constitutional right of expression in any medium at any time without the probation officer's permission except through the Internet. He may also exercise his right through the Internet after obtaining his probation officer's permission.

Defendant's reliance on *In re Englebrecht* (1998) 67 Cal.App.4th 486 (*Englebrecht*) is misplaced. In *Englebrecht*, the district attorney filed a civil complaint for injunctive relief to abate a public nuisance. (*Id.* at p. 489.) The complaint alleged that gang members had created a public nuisance by engaging in illegal activity within a

"Target Area." (*Ibid.*) The trial court granted a preliminary injunction prohibiting 28 named gang members and 50 Doe defendants from engaging in certain activities, including associating with known gang members and using or possessing pagers or beepers, within the Target Area. (*Id.* at pp. 489-490.) After the defendant was seen in the company of gang member and found with a pager in the Target Area, he was found in contempt for violating the injunction. (*Id.* at p. 491.)

On appeal, the defendant argued that the provision in the injunction prohibiting the use and possession of pagers or beepers in the Target Area was unconstitutionally overbroad. (*Englebrecht*, *supra*, 67 Cal.App.4th at p. 496.) The Court of Appeal observed that pagers and beepers "have countless lawful, legitimate and everyday uses" and "as long as the devices are not used for illegal purposes, any [government] regulations must be narrowly tailored so as not to run afoul of the First Amendment." (*Id.* at p. 498.) The court also noted that there was no evidence showing a "nexus" between the use of pagers and beepers and the abatement of the public nuisance. (*Ibid.*) Since the injunction prohibited pagers and beepers for legitimate purposes as well as illegitimate ones, the court concluded the injunction was unconstitutionally overbroad. (*Ibid.*)

Englebrecht is distinguishable from the present case. In *Englebrecht*, the order affected the constitutional rights of third parties not before the court. (*Englebrecht*, *supra*, 67 Cal.App.4th at p. 497 ["A party, such as Englebrecht, is allowed to challenge a statute on its face not because his own rights of free expression are violated, but because its 'very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'"].) This analysis does not apply to a defendant challenging a probation condition. "Because probation conditions foster rehabilitation and protect the public safety, they may infringe the constitutional rights of the defendant, who is 'not entitled to the same degree of constitutional protection as other citizens.' [Citation.]" (*People v. Jungers* (2005) 127 Cal.App.4th 698, 703.) Moreover, unlike in

Engelbrecht, here, defendant used the Internet and social networking sites to facilitate his crime.

Defendant also relies on *In re Victor L.* (2010) 182 Cal.App.4th 902 (*Victor L.*). He notes that the Court of Appeal modified a probation condition that the minor not "use, possess or have access to" a computer with Internet access. He then argues that "even for a minor on probation in juvenile court - whose constitutional rights may be curtailed to a greater extent than those of an adult probationer - a ban on internet access is constitutionally infirm."

Victor L. does not support defendant's position. In *Victor L.*, the minor challenged three probation conditions: "(1) 'The Minor shall not access or participate in any Social Networking Site, including but not limited to Myspace.com'; (2) 'The Minor shall not use, possess or have access to a computer which is attached to a modem or telephonic device'; and (3) 'The Minor shall not be on the Internet without school or parental supervision.'" (*Victor L.*, *supra*, 182 Cal.App.4th at p. 923, fn. omitted.) The first condition also called for the minor's Internet usages to be "'subject to monitoring by Probation, parents or school officials.'" (*Id.* at p. 923, fn. 15.) The minor did not challenge the monitoring provision. (*Ibid.*)

The *Victor L.* court concluded: "[T]o the extent the second Internet condition prohibits any 'use of' or 'access to' an Internet-enabled computer, we find it conflicts with the other two conditions, thereby making the combination of conditions unconstitutionally vague. Indeed, the second Internet condition could ensnare a minor in a claimed probation violation even if he were engaged in completely innocent and legitimate use of a computer for scholarly or job-related purposes, and even if he were supervised by an adult during such use. For that reason, we will retain the condition prohibiting *possession* of an Internet-enabled computer, while striking the language prohibiting 'access to' or 'use of' such a computer. We therefore modify the second computer use condition to read as follows: 'The Minor shall not . . . possess . . . a

computer which is attached to a modem or telephonic device [or which has an internal modem].' We leave the first and third Internet conditions in place." (*Victor L.*, *supra*, 182 Cal.App.4th at pp. 926-927, fns. omitted.) Thus, the probation conditions requiring the minor's access to the Internet to be monitored were approved. Similarly, here, defendant must obtain the probation officer's approval of his Internet use.

2. Social Networking Sites Probation Condition (No. 9)

Probation condition No. 9 states: "The defendant shall not knowingly enter any social networking sites, including, but not limited to Facebook, Instagram, Twitter, Snapchat, or any other site, which the probation officer informs him of and/or applications or apps pertaining to said accounts nor post any ads, either electronic or written, unless approved by the probation officer."

Defendant contends that the probation condition is unconstitutionally overbroad, because it bars him from reading posts by others and discussing political and social issues on social networking sites, and thus constitutes a prior restraint on his First Amendment rights. He again relies on *Engelbrecht*, *supra*, 67 Cal.App.4th 486. For the reasons outlined in our discussion of the probation condition regarding Internet access, we reject this contention.

3. E-Mail Addresses and Passwords Probation Condition (No. 10)

At sentencing, the trial court imposed probation condition No. 10 as follows: "The defendant shall report all personal e-mail[] addresses. [¶] The defendant shall report websites and passwords to the probation officer within five days."

As written in the probation department memorandum, probation condition No. 10 states: "The defendant shall report all personal e-mail addresses used and shall report websites with passwords to the Probation Officer within five days."

Defendant argues that this probation condition is vague due to the discrepancy between the oral pronouncement and the written condition.

"[T]hough the older rule is to give preference to the reporter's transcript where there is a conflict, the modern rule is that if the clerk's and reporter's transcripts cannot be reconciled, the part of the record that will prevail is the one that should be given greater credence in the circumstances of the case. [Citations.]" (*Pirali*, *supra*, 217 Cal.App.4th at p. 1346.)

We first note that if defendant had made a timely objection regarding this discrepancy, the issue could have been resolved at the sentencing hearing. In any event, the parties agree that the written condition should be given preference.

Defendant claims that probation condition No. 10 requires him "to turn over a list of websites that require passwords but not the passwords themselves. Under the condition as written, the phrase 'with passwords' is descriptive of the noun 'websites.' It is not a direct object of the verb 'shall report.'"

A probation condition should be given "'the meaning that would appear to a reasonable, objective reader.' [Citation.]" (*People v. Olguin* (2008) 45 Cal.4th 375, 382 (*Olguin*).) We interpret a probation condition in "context" and using "common sense." (*In re Ramon M.* (2009) 178 Cal.App.4th 665, 677 (*Ramon M.*).)

When read in a reasonable, common sense manner, probation condition No. 10 requires defendant to report to the probation officer, within five days, a list of the Web sites that he visits that require a password as well as the corresponding password. Defendant's interpretation that he provide a list of all Web sites with passwords, but not the passwords themselves is irrational. The probation officer cannot monitor any communications that defendant may make on such Web sites without the passwords. We also find defendant's argument that the probation officer could ask defendant to enter the password for him or her as highly impractical.

Defendant next argues that this condition is overbroad, because it allows the probation officer to have "unfettered access" to his banking, Paypal, Amazon, and Netflix

accounts and to "manipulate" these accounts. He also raises the issue of whether these passwords would be securely stored by the probation officer.

Here, the probation condition allows the probation officer access to defendant's electronic devices and passwords. However, a probation search condition may not be "undertaken for harassment or for arbitrary or capricious reasons or in an unreasonable manner." (*People v. Medina* (2007) 158 Cal.App.4th 1571, 1577.) Thus, this probation condition does not allow the probation officer to either control or manage defendant's accounts.

We further note that the record is devoid of any evidence that defendant has electronic access to any banking, Paypal, Amazon, or Netflix accounts or how the probation department securely stores such information. In the event defendant has specific concerns, he may bring a motion to modify the terms of his probation. (Pen. Code, § 1203.3.)

4. Data Encryption Probation Condition (No. 11)

Probation condition No. 11 also states in relevant part: "The defendant shall not knowingly possess or use any data encryption technique or programmed device."

Defendant points out that "[g]iven the prevalence of encryption embedded in devices, websites, and computer programs today, it is virtually impossible to use an internet-connected device or cell phone without using an encryption technique or program." Thus, he contends that the prohibition on the use of any data encryption technique or program is both overbroad and vague.

Probation condition No. 11 is not overbroad. The scienter requirement of this condition serves to restrict its scope to defendant's use of an encryption technique or an encrypted device to conceal his illegal activities on the Internet, not to preclude him from using a credit card at the store, obtaining cash from an ATM machine, or watching a Netflix movie. The incidental use of data encryption in such circumstances is entirely

different from knowingly using data encryption to prevent law enforcement from effectively searching an electronic device.

Defendant also argues that "[t]o the extent that the probation condition could be read more narrowly than to prohibit any use of an encryption technique or program, regardless of whether [he] actively started the program or initiated use of the technique, it is unconstitutionally vague. It fails to put [him] on notice of which activities are permitted and which are prohibited by the condition." We disagree. When read in a reasonable, common sense manner, probation condition No. 11 puts defendant on notice that he must not knowingly use encryption to hide his digital activities from law enforcement. (*Olguin*, *supra*, 45 Cal.4th at p. 382; *Ramon M.*, *supra*, 178 Cal.App.4th at p. 677.*)*

5. Electronic Search Probation Conditions (Nos. 6, 7, and 8)

Probation condition No. 6 provides that defendant shall give consent to "any peace officer or law enforcement agency to seize and search all electronic devices, including, but not limited to cellular phones, particularly computers or notepads in his possession or under his control to a search of any text messages, voicemail messages, call logs, photographs, e-mail accounts, social media accounts, including, but not limited to Facebook, Instagram, Twitter, Snapchat, or any other site which the Probation Officer informs him [of] and/or applications or apps pertaining to said accounts at any time with or without a warrant."

Probation condition No. 7 requires defendant "to provide all passwords necessary to access or search such electronic devices, including, but not limited to cellular phones, computers, or notepads, and understand that refusal to provide the password would constitute a violation of the terms of his probation."

Probation condition No. 8 states that "[t]he defendant's computer and all other electronic devices, including, but not limited to cellular phones, laptop computers, or

notepads is subject to forensic analysis search by any peace officer or law enforcement agency at any time with or without a warrant."

Defendant contends the electronic search conditions are overbroad, because they prevent him from engaging in lawful activity unrelated to his conviction or rehabilitation and do not serve a compelling state interest. He contends that these conditions should be stricken or modified to reflect the state's interest in monitoring his behavior that relates to the crime.[2]

The Attorney General responds that the electronic search conditions are not facially unconstitutional. He further contends that defendant failed to object to these probation conditions and thus the issue of their constitutionality has been forfeited.

A defendant may raise for the first time on appeal a facial constitutional defect in a probation condition when the claim involves "'"pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citations.]'" (*Sheena K.*, *supra*, 40 Cal.4th at p. 889.) A facial constitutional challenge to the "phrasing or language of a probation condition . . . does not require scrutiny of individual facts and circumstances but instead requires the review of abstract and generalized concepts—a task that is well suited to the role of the appellate court." (*Id.* at p. 885.)

In contrast, a constitutional defect that is "correctable only by examining factual findings in the record or remanding to the trial court for further findings" is subject to forfeiture if the claim was not raised in the trial court. (*Sheena K.*, *supra*, 40 Cal.4th at

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[2] The California Supreme Court has granted review in *In re Ricardo P.* (2015) 241 Cal.App.4th 676, review granted February 17, 2016, S230923, which involves the propriety of a probation condition requiring a minor to submit to an electronics search condition. Review has been granted in several other cases presenting similar issues, with briefing deferred. (See e.g., *In re Q.R.* (2017) 7 Cal.App.5th 1231, review granted Apr. 12, 2017, S240222; *People v. Nachbar* (2016) 3 Cal.App.5th 1122, review granted Dec. 14, 2016, S238210; *In re J.E.* (2016) 1 Cal.App.5th 795, review granted Oct. 12, 2016, S236628.)

p. 887.) In other words, not "'all constitutional defects in conditions of probation may be raised for the first time on appeal, since there may be circumstances that do not present "pure questions of law that can be resolved without reference to the particular sentencing record developed in the trial court." [Citation.]'" (*Id.* at p. 889.)

Here, defendant objected to the probation conditions regarding "the broad term of Internet use," specifically probation condition Nos. 11 and 12. The electronic search conditions are related to defendant's use of the Internet, because they are the means by which the probation officer monitors his conduct. Thus, defendant has preserved his constitutional challenge to the electronic search conditions.

Defendant first cites *Riley v. California* (2014) 573 U.S. __ [134 S.Ct. 2473] (*Riley*), in which the United States Supreme Court held that the warrantless search of a suspect's cell phone implicated and violated the suspect's Fourth Amendment rights. (*Id.* at p. __ [134 S.Ct. at p. 2493].) In reaching its holding, the *Riley* court observed that many modern cell phones have the capacity to be used as minicomputers and can potentially contain vast amounts of information about an individual's life. (*Id.* at pp. __, __ [134 S.Ct. at pp. 2488-2489].) The court also cautioned that its holding was that cell phone data is subject to Fourth Amendment protection, "not that the information on a cell phone is immune from search." (*Id.* at p. __ [134 S.Ct. at p. 2493].)

Here, defendant is a probationer. Thus, he is unlike the defendant in *Riley*, who was searched before he had been convicted of a crime and was still protected by the presumption of innocence. "Inherent in the very nature of probation is that probationers 'do not enjoy "the absolute liberty to which every citizen is entitled."' [Citations.] Just as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens." (*United States v. Knights* (2001) 534 U.S. 112, 119.) Thus, *Riley* is distinguishable from the present case.

In *Ebertowski, supra*, 228 Cal.App.4th 1170, this court rejected an overbreadth challenge to similar probation conditions. In *Ebertowski*, the defendant was a gang member, who promoted his gang on social media. (*Id.* at p. 1173.) The challenged probation conditions required him: to "'provide all passwords to any electronic devices (including cellular phones, computers or notepads) within his custody and control and . . . submit said devices to search at [any time] without a warrant by any peace officer'" and to "'provide all passwords to any social media sites (including Facebook, Instagram and Mocospace) and . . . submit said sites to search at [any time] without a warrant by any peace officer.'" (*Ibid.*) This court rejected the defendant's claim that the probation conditions "were not narrowly tailored to their purpose so as to limit their impact on his constitutional rights to privacy, speech, and association." (*Id.* at p. 1175.) This court concluded that the state's interest in preventing the defendant from continuing to associate with gangs and participate in gang activities, which was served by the probation condition, outweighed the minimal invasion of his privacy. (*Ibid.*)

In *People v. Appleton* (2016) 245 Cal.App.4th 717 (*Appleton*), a different panel of this court distinguished *Ebertowski* and held that a probation condition allowing the search of the defendant's electronic devices was unconstitutionally overbroad. (*Appleton*, at p. 727.) The defendant in *Appleton* was convicted of false imprisonment based on an incident which occurred about a year after he met the minor victim through a social media application. (*Id.* at p. 719.) The probation condition at issue provided that the defendant's computers and electronic devices were subject to "'forensic analysis search for material prohibited by law.'" (*Id.* at p. 721.) Given the tenuous connection between the defendant's crime and the use of electronic devices, it was appropriate to require the trial court to impose a narrower condition. The *Appleton* court suggested that "the trial court could impose the narrower condition approved in *Ebertowski*, whereby defendant must provide his social media accounts and passwords to his probation officer for monitoring. Alternately, the court could impose a condition restricting defendant's use of

or access to social media Web sites and applications without prior approval of his probation officer. [Citation.]" (*Appleton*, at p. 727, fn. omitted.)

In the present case, defendant used electronic devices to advertise and arrange for the sexual trafficking of a minor. Even while defendant was incarcerated for the charged offense, he indicated his intentions to continue pimping the minor and to expand his "pimping 'empire.'" As in *Ebertowski*, *supra*, 228 Cal.App.4th at p. 1175, broad access to defendant's electronic devices is essential to monitor his progress on probation and to ensure that he is not continuing to engage in the type of criminal conduct that led to him being placed on probation.

III. Disposition

The order is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.